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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1963

ANTHONY BARATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner, who was tried with three others, was convicted of unlawfully selling heroin and of conspiring to do so. He was sentenced to consecutive terms of ten years' imprisonment on the substantive count and five years' imprisonment for the conspiracy. The court of appeals affirmed (Pet. App. A).

The evidence, the sufficiency of which is not disputed, is set forth in detail in the opinion of the court

below (Pet. App. A. 4-11), on which we principally rely. We add thereto the following comments.

1. The government's proof showed that petitioner was at least the delivery man in a conspiracy to sell a quarter of a kilogram of heroin to an undercover agent at the 292 Club in New York City (Pet. App. A. 7a-9a). When petitioner testified at his trial he sought to explain his presence at the club and several meetings that night with one Verzino, the immediate transferor, through a story that he was impoverished and had come to the club to borrow $200 from Verzino (Pet. App. A. 9a-10a). Since petitioner's explanation of his movements was consistent with the existing testimony, it was important for the government to impeach his credibility by showing that his financial condition was hardly desperate, as he had sworn it was. At the time of his arrest in July 1964, petitioner was living with his family in a large house in Greenwood Lake, New Jersey. On the property was a Thunderbird automobile with $5,260 in the trunk, and in his bedroom were documents reflecting, among other things, the purchase of an 18-foot boat and a new Buick. The documents were in the name "Baronne". It was therefore essential to show that petitioner and Baronne were the same person. Petitioner, when asked on cross-examination whether he had been living under the name Baronne at the time of his arrest, denied that fact. After an *in camera* colloquy, the government was then permitted to show petitioner a piece of paper and to ask him whether it refreshed his recollection on this point. Petitioner replied in the negative. The paper was identified in the *in camera*

conference as a statement, taken from petitioner shortly after his arrest, without having received the warnings subsequently required by *Miranda* v. *Arizona*, 384 U.S. 436,[1] containing an admission that, at the time of his arrest, he was using the name Baronne (Pet. App. A. 10a, 12a). The paper was not, however, described to the jury or admitted into evidence.

The prosecutor was also permitted to show petitioner the various documents seized from the house at the time of his arrest and to inquire if any of these refreshed his recollection as to whether or not he was living under the name Baronne. Petitioner denied that he had seen the documents before or that they were in his possession at the time of his arrest (Pet. App. A. 10a). In rebuttal, the government called narcotics agent Martowsky, who testified that he and other agents had arrested petitioner on July 11, 1964, and had seized the above documents and money from a bureau in his bedroom and from the Thunderbird parked in the driveway. The documents were then admitted into evidence (R. 696-697, 708-716).

2. While petitioner contends that the use of his post-arrest statement was prohibited by *Miranda* v. *Arizona*, 384 U.S. 436, it is clear that *Miranda* is not truly involved. The statement objected to was not introduced into evidence, even for impeachment. Unlike the situation in *Walder* v. *United States*, 347 U.S. 62, on which petitioner primarily relies (Pet. 2), the government did not bring before the jury on a collateral question

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[1] The trial was post-*Miranda*, but the statement ante-dated that decision by almost two years.

some evidence that it was constitutionally precluded from introducing as part of the case-in-chief.[2] Rather, the statement was merely shown to petitioner in the course of cross-examination. As the court of appeals stated (Pet. App. A. 13a): "It is basic evidence law that a witness' recollection may be properly refreshed by writings and papers which are not in themselves admissible in evidence". There is nothing in the record which would have led the jury to suspect that what was shown to petitioner was his own *statement* containing an admission of his prior use of the name Baronne. Moreover, as the court below held (Pet. App. A. 13a), any inkling the jury might have had that such was the content of the document can fairly be said to have had no conceivable impact on the verdict, since that information "would have been merely cumulative to the massive documentary evidence on this point that was offered by the government in rebuttal."[3]

With respect to this documentary evidence, the court of appeals determined that it had been properly seized incident to petitioner's arrest without a warrant by the narcotics agents on July 11, 1964. The court's finding that there was probable cause for the

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[2] We note that in *Walder* the Court found that the circumstances permitted such a course.

[3] These arguments equally extend to petitioner's contention that his statement was taken in violation of *McNabb* v. *United States*, 318 U.S. 332. See Pet. 15-16.

arrest is correct. While the facts establishing probable cause were not litigated with a focus on this issue, it adequately appears from the trial testimony of the agents, as the court below held (Pet. App. A. 14a), that at the time of the arrest the agents had "an abundance of probable cause * * *." The agents' knowledge of petitioner's role in the heroin sale derived from their personal observations at the time. Petitioner's further argument that the agents required a warrant to make the arrest is contrary to express statutory and judicial authority. See 26 U.S.C. 7607(2); *Draper* v. *United States*, 358 U.S. 307; cf. *Ford* v. *United States*, 352 F. 2d 927 (C.A.D.C.) (en banc). Petitioner unjustifiably alleges that the agents made a deliberate attempt to conceal the fact that petitioner's arrest was not made under warrant—because of the circumstance that one of the agents swore out a complaint against petitioner on July 13, 1964, two days after his arrest. As the court below indicated (Pet. App. A. 12a, n. 3), the confusion is regrettable but hardly conspiratorial. (See, also, R. 980-982.) It is hard to see, in any event, why defense counsel's erroneous belief that the arrest had been pursuant to a warrant should excuse his failure to inquire into the probable cause question, which may have equal significance even where a warrant had been obtained. Furthermore, in light of the fact that a warrant was not required, counsel's lack of knowledge that there had been no warrant is without significance. Petitioner's further effort to implicate the prosecutor in this alleged conspiracy of concealment

(see Pet. 10-34) is, as the record shows, baseless. See R. 676-706.[4]

3. Petitioner's contention that the trial court's instructions confused the jury as to the distinctness of the substantive and conspiracy counts is refuted by the very facts recited in the petition (Pet. 44-47).[5] The jury was instructed both at the beginning and near the end of the court's charge that the two counts were distinct and were to be considered separately. Moreover, as petitioner admits (Pet. 48), no objection on the ground of insufficient differentiation of the charge was made at trial. See Rule 30, F.R.Crim.P. In the circumstances, there was patently no "plain error". See Rule 52, F.R.Crim.P. His remaining attacks on the instructions (Pet. 49-50) are also insubstantial. The court below accurately held that insofar as portions of the charge may have been objectionable,

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[4] The court below appropriately found it unnecessary to reach the *Walder* issue with respect to either of petitioner's claims (Pet. App. A. 11a-12a, 15a). We suggest, however, that the use in rebuttal of the various items seized at the time of petitioner's arrest was valid, irrespective of the legality of the seizure. Petitioner purports to distinguish *Walder* on the ground that the rebuttal testimony in this case related to cross-examination whereas in *Walder* the matter rebutted was first alluded to in the defendant's direct examination. On the contrary, the rationale of *Walder*—that a defendant may not take advantage of the Fourth Amendment exclusionary rule to testify falsely free from the risk of rebuttal by evidence which has been illegally seized—applies equally to situations where the false testimony is elicited during proper cross-examination as well as during the direct.

[5] Petitioner here makes no allegation, as he did below (Pet. App. A. 18a-23a), that the court's instructions on the elements of the respective offenses were fatally defective.

petitioner failed to raise the point before the trial court; and in any event the deficiencies were not, in context, prejudicial (Pet. App. A. 19a-21a, 22a-23a).

4. Petitioner's counsel reiterates the argument (Pet. 50-56) advanced by him in the petition in *Taller* v. *United States*, No. 245, this Term, that punishment for conspiracy and a substantive offense subjected petitioner to double jeopardy. The court of appeals rejected this contention along with various others which it characterized as "so patently without merit that they do not warrant discussion" (Pet. App. A. 23a).* The contention is clearly foreclosed by decisions of this Court. *Pereira* v. *United States*, 347 U.S. 1; *Gore* v. *United States*, 357 U.S. 386; *Callanan* v. *United States*, 364 U.S. 587.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1968.

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*The court also in this way dismissed as frivolous the other questions which petitioner declines to argue in his petition but wishes "preserved in the event of the granting of certiorari" (Pet. 3).

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